Filed 7/15/19 P. v. Solano CA2/3
Received for posting 7/16/19

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADOLFO SOLANO et al., Defendants and Appellants.	B286566 (Los Angeles County Super. Ct. No. TA143387)

APPEALS from judgments of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant Adolfo Solano.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant Daniel Ramirez.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants and appellants Daniel Ramirez and Adolfo Solano of attempted murder. Ramirez and Solano challenge their convictions, contending the trial court committed instructional errors and defense counsel provided ineffective assistance by failing to object to portions of the prosecutor's argument. Discerning no prejudicial error, we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

Appellants Solano and Ramirez are cousins. Solano and Georgina Alvarado met in middle school and dated for several years. Their relationship ended and Alvarado began dating the victim, Cesar Mares, in 2015. During their relationship, Mares frequently physically abused Alvarado, leaving visible bruises and injuries to her face, back, and legs. Solano and Alvarado remained friends after they stopped seeing each other, and Solano was aware of Mares's abuse.

Early in the summer of 2016, Alvarado and Mares broke up. However, the couple got back together again, without telling their families, in late June or early July.

Yvette Hernandez is Alvarado's sister. In the summer of 2016, Hernandez was dating Ramirez.

On July 1, 2016, Mares and Alvarado spent the night at Green Meadows Park in Watts, near Alvarado's home.

On July 2, 2016, Alvarado and Solano had a telephone conversation in which they argued about some items of Alvarado's that were in Solano's possession. Alvarado told Solano not to visit her or "hit [her] up" any longer.

That night, Alvarado and Mares planned to spend the night at Green Meadows Park again. They went to a secluded, dark area of the park and laid out blankets that Alvarado had brought to sleep on.

Meanwhile, Hernandez was with Ramirez and Solano at Solano's home. Alvarado's and Hernandez's mother, Maribel Marin, told Solano in a telephone conversation that Alvarado was angry and had gone to the park. Additionally, Hernandez told Solano that Alvarado had come home with hickey marks on her neck and wearing the same clothing she had worn the previous evening. Upon hearing this, Solano appeared disappointed and upset, and he and Ramirez stepped aside and had a conversation. Hernandez told appellants that Alvarado might be at the park.

Thereafter, Ramirez drove Solano and Hernandez to Green Meadows Park so they could make Alvarado feel better. Hernandez spotted Alvarado's leopard patterned blanket, and pointed it out to Solano. Solano exited the car and headed to the spot where Alvarado and Mares were lying under the blankets. Mares, who was lying on his side with a blanket over his head, was unarmed. Solano said, " '[W]hat is up fool? Where are you from?' " and stabbed him in the right armpit with a kitchen knife. Ramirez held Mares down. Mares did not try to defend himself; he managed to get up and run away, and Ramirez and Solano pursued him. Alvarado told Solano to stop and ran after the group. When Mares tripped and fell, Ramirez and Solano caught up to him and Solano stabbed him again. Alvarado pulled Solano away, enabling Mares to run toward a crowd of people located at the park's basketball court.

Solano and Ramirez returned to their car, where Hernandez was waiting for them. Neither appellant appeared to be injured. Hernandez drove them away from the park.

Emergency personnel transported Mares to a hospital, where he was treated for multiple stab wounds in the back, abdomen, and the armpit. He was close to death when he arrived and had lost a great deal of blood. He survived, but spent eight or nine days in the hospital.

Alvarado told an officer who questioned her at the scene that Solano stabbed Mares, while Ramirez held him down. When officers interviewed her near midnight at the hospital where Mares was being treated, she reiterated that Solano approached her and Mares while they were lying down in the park and stabbed Mares with a kitchen knife, while Ramirez attempted to hold Mares down.

b. *Appellant Ramirez's evidence*

Alvarado's mother, Marin, testified that on July 2, 2016, she told Solano that Alvarado might be at the park. However, Marin did not know Alvarado had resumed dating Mares, did not know Mares was with her at the park, and did not tell Solano that Mares was with Alvarado. Later she heard helicopters and Alvarado called her, crying and asking for help. Solano then called and repeatedly said he was sorry.

In a telephonic interview with a defense investigator, Hernandez stated that she was with Solano and Ramirez when Marin called and asked Hernandez to check on Alvarado, who was at the park; Ramirez drove the group to the park; Hernandez and Ramirez stayed in the car while Solano looked for Alvarado; a man got up and hit Solano, and Solano returned the punch; and Solano then returned to the car.

Ramirez testified in his own defense. He, Hernandez, and Solano drove to the park. Solano got out of the car, but he and Hernandez did not. He denied taking part in the attack on Mares. He did not know Mares and did not see him on July 2.

c. *Appellant Solano's evidence*

Solano also testified in his own behalf. On July 2, 2016, he was at home with Ramirez when Alvarado called him, angry about the return of some books. He phoned Marin, who told him Alvarado had been acting stressed out and had gone to the park. Hernandez also informed him that Alvarado had been "acting strange." Hernandez also told him something about Alvarado's ex-boyfriend. Worried about Alvarado, Solano asked Ramirez for a ride to the park, so he could talk to her. He did not know she was with Mares, or that they were dating, and did not know of Mares's abuse. He was armed with a knife with a three-inch blade, which he regularly carried for his work. Once at the park, Ramirez stayed in the car the entire time. He found Alvarado with Mares. Mares became angry, the men argued, Mares swung at Solano, and Solano punched back. Mares then pulled a knife from his pocket. Stunned and in fear for his life, Solano attacked with his own knife, and stabbed Mares in self-defense. He did not chase Mares.

d. *People's rebuttal*

Los Angeles Police Department Detective John Hankins conducted audiotaped interviews with the defendants, which were played for the jury. Ramirez told officers he drove Solano to the park as a favor so Solano could talk to a girl, but did not know what happened there. Solano initially stated he was not at the park and had not been involved in the stabbing. Eventually, after the officers used a ruse, Solano admitted he went to the

park to see Alvarado. He did not know Alvarado was with Mares. Mares approached him, they got in a fight, and he stabbed Mares in self-defense after Mares pulled out a knife.

2. *Procedure*

A jury convicted Ramirez and Solano of the attempted murder of Mares (Pen. Code, §§ 664, 187, subd. (a)).[1] It found Solano committed the crime willfully, deliberately and with premeditation (§ 664, subd. (a)), personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury upon Mares (§ 12022.7, subd. (a)). As to Ramirez, the jury rejected the allegation that the crime was committed willfully, deliberately and with premeditation. The trial court sentenced Ramirez to seven years in prison. It sentenced Solano to life in prison for the attempted premeditated murder, plus three years for the great bodily injury enhancement and one year for the weapon enhancement. As to both defendants, the trial court imposed a $300 restitution fine, a suspended parole revocation restitution fine in the same amount, a $40 court operations assessment, and a $30 criminal conviction assessment. Ramirez and Solano timely appealed.

DISCUSSION

1. *Claims of instructional error*

Appellants raise several claims of instructional error. None has merit.

---

[1] All further undesignated statutory references are to the Penal Code.

a. *Lesser included offense instruction*

The parties did not request, and the trial did not give, instructions on any lesser included offense. Ramirez argues that the trial court erred by failing to instruct the jury on assault with a deadly weapon (§ 245, subd. (a)(1)), which he contends is a lesser included offense of murder. He is incorrect.

Instruction on a lesser included offense is required, even absent a request, when there is evidence the defendant is guilty of the lesser offense, but not the greater. (*People v. Smith* (2013) 57 Cal.4th 232, 239; *People v. Whalen* (2013) 56 Cal.4th 1, 68, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17.) "For purposes of determining a trial court's instructional duties," a " 'lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]' " (*People v. Smith*, at p. 240.) When applying the accusatory pleading test, a court considers whether the charging allegations describe the offense in such a way that, if committed as alleged, the greater necessarily subsumes a lesser offense. (*People v. Alarcon* (2012) 210 Cal.App.4th 432, 436; *People v. Banks* (2014) 59 Cal.4th 1113, 1160, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3; *People v. James* (2014) 230 Cal.App.4th 1256, 1260.) It has long been the law that enhancement allegations are not part of this calculus. (*People v. Wolcott* (1983) 34 Cal.3d 92, 101 (*Wolcott*); *People v. Sloan* (2007) 42 Cal.4th 110, 114 [the "long-standing rule" is that "enhancements may not be considered as part of an accusatory pleading for purposes of identifying lesser

included offenses"]; *People v. Boswell* (2016) 4 Cal.App.5th 55, 59 ["our high court has repeatedly stated that sentencing enhancements are not elements of the offense and cannot be considered in determining whether an offense is a lesser included offense"]; *People v. Alarcon*, at p. 436 ["Following *Wolcott*, courts have concluded that under the accusatory pleading test, gun use and great bodily injury enhancement allegations accompanying an attempted murder charge do not render assault with a deadly weapon a lesser included offense of the charged attempted murder"]; *People v. Parks* (2004) 118 Cal.App.4th 1, 6.) We independently review the question of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

Under the elements test, assault with a deadly weapon is not a lesser included offense of attempted premeditated murder. Attempted murder can be committed without using a deadly weapon. (*People v. Nelson* (2011) 51 Cal.4th 198, 215; *People v. Solis* (2015) 232 Cal.App.4th 1108, 1116; *People v. Richmond* (1991) 2 Cal.App.4th 610, 616; cf. *People v. Parks*, *supra*, 118 Cal.App.4th at p. 6 [assault with a firearm is not a lesser included offense of attempted murder].) The same result obtains under the accusatory pleading test. The information alleged, in count 1, that Solano committed attempted murder; it also alleged, as an enhancement, that Solano personally used a deadly and dangerous weapon, a knife. Count 2 of the information alleged that Ramirez committed attempted murder, stating that Ramirez "did unlawfully and with malice aforethought attempt to murder" Mares. No deadly weapon enhancement was alleged as to Ramirez. Thus, the offense was not alleged in such a way as to make assault with a deadly weapon a lesser included offense.

Ramirez acknowledges that *Wolcott* and other authorities hold that enhancements may not be considered when determining whether an offense is necessarily included under the accusatory pleading test. Nonetheless, he argues that *Wolcott* has been undermined by *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny. In *Wolcott*, our Supreme Court held that assault was not a lesser included offense of robbery, and the "addition of an allegation that defendant used a firearm . . . does not alter this conclusion." (*Wolcott*, *supra*, 34 Cal.3d at pp. 98, 100.) *Wolcott* reasoned that the enhancement statute did not define a new offense, but merely prescribed additional punishment for an offense in which a firearm was used. (*Id.* at p. 100.) Treating the enhancement allegation as part of the accusatory pleading for the purpose of defining a lesser included offense would "confuse the criminal trial" and muddle established trial and sentencing procedures. (*Id.* at p. 101.)

Apprendi held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) In this context, the high court held that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19.) Ramirez argues that under *Apprendi*, a conduct enhancement is the equivalent of an element of a crime. He insists that *Apprendi* "eliminated any distinction between elements of a crime and conduct enhancements," thereby undercutting *Wolcott*'s rationale and requiring that the deadly

weapon enhancement alleged against Solano "should be considered an element of attempted murder for purpose[s] of determining what lesser included offenses were raised by the evidence."

Ramirez's argument fails. Even if the enhancement alleged against Solano was attributable to Ramirez for purposes of the accusatory pleading or elements test, Ramirez's contentions have been repeatedly rejected.[2] "[O]ur Supreme Court has affirmed the vitality of *Wolcott* and the limited scope of *Apprendi*." (*People v. Alarcon*, *supra*, 210 Cal.App.4th at pp. 434, 437 [rejecting argument that *Apprendi* overruled *Wolcott* and required that gun enhancement allegations in an accusatory pleading made assault with a deadly weapon a lesser included offense of attempted murder]; *People v. Sloan*, *supra*, 42 Cal.4th at pp. 114, 122—123 [*Apprendi* had no effect on the principle that enhancements may not be considered for purposes of the rule prohibiting multiple convictions based on necessarily included offenses]; *People v. Izaguirre* (2007) 42 Cal.4th 126, 128, 130—134 [rejecting argument that under *Apprendi*, conduct enhancements must be treated as elements for purposes of the multiple conviction rule]; *Porter v. Superior Court* (2009) 47 Cal.4th 125, 137 [noting rejection of "the notion that the high court's 'functional equivalent' statement [in *Apprendi*] requires us to treat penalty allegations as if they were actual elements of offenses for all purposes under state law"].) We are thus bound to follow *Wolcott*. (*Auto Equity Sales*, *Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Ramirez's equal protection argument fares no better.

---

[2] Ramirez explains that he raises this issue to preserve it for federal review.

Ramirez asserts that "[t]he equal protection clause . . . requires that the accusatory pleading test consider conduct enhancements." He argues that a defendant who is charged with a substantive crime is similarly situated to a defendant who is charged with a substantive crime and an enhancement, but the former is entitled to instructions on a lesser included offense, whereas the latter is not. But the " ' "first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner" ' " for purposes of the law challenged. (*People v. Morales* (2016) 63 Cal.4th 399, 408, italics omitted; *People v. Mora* (2013) 214 Cal.App.4th 1477, 1483.)

Ramirez fails to make this showing here. *People v. Wolfe* (2018) 20 Cal.App.5th 673, is instructive. There, the defendant, while driving under the influence, killed a pedestrian and was charged with murder. The trial court denied her request that the jury be instructed on involuntary or vehicular manslaughter, because these offenses were not lesser included offenses. (*Id.* at p. 677.) On appeal, she argued that the jury's "all-or-nothing choice" between murder and acquittal violated her right to equal protection; had she committed a homicide by a means other than a vehicle, an instruction on a lesser included offense would have been given. (*Id.* at p. 686.) Rejecting the claim, *Wolfe* explained defendant's argument was "base[d] . . . on a faulty premise." (*Id.* at p. 687.) Not all defendants accused of implied malice murder by means other than a vehicle were entitled to a lesser included offense instruction; such was required only when warranted by the evidence. Thus, defendant failed to establish disparate treatment. (*Id.* at pp. 687—688.) Further, there was a

rational basis for the charging scheme: the Legislature sought to punish and discourage people from driving under the influence. (*Id.* at p. 690.)

The same is true here. A lesser included offense instruction may be given only when there is substantial evidence in support of it; not all defendants who are charged with attempted murder, but not enhancements, are entitled to lesser included offense instructions. Ramirez thus fails to establish disparate treatment. (*People v. Wolfe*, *supra*, 20 Cal.App.5th at p. 687.) Moreover, there is a rational basis for treating weapon use differently: the Legislature could reasonably find persons who attempt murder by using a dangerous or deadly weapon present a greater danger to society than do persons who commit murder by other means. Ramirez's equal protection challenge thus lacks merit.

b. *Instructions on mental state*

The trial court gave the jury standard instructions on aiding and abetting, CALCRIM Nos. 400 and 401. Neither appellant objected to the instructions or requested that they be clarified or modified. Ramirez now contends that the trial court erred by failing to sua sponte instruct the jury that it must assess his mental state independently of Solano's, a principle that he contends was not adequately conveyed by the instructions given. He also avers that the aiding and abetting instructions were confusing because they "should have been tailored to replace the phrase, 'the crime,' with the phrase, 'murder,' " to ensure the jury convicted him of murder only if he had the intent to aid and abet murder, as opposed to assault. These contentions lack merit.

When reviewing a purportedly ambiguous or misleading instruction, we inquire whether there is a reasonable likelihood

the jury applied it in a way that violates the Constitution. (*People v. O'Malley* (2016) 62 Cal.4th 944, 991 (*O'Malley*); *People v. Boyce* (2014) 59 Cal.4th 672, 714.) We consider the instructions as a whole, as well as the entire record of the trial, including the arguments of counsel. (*O'Malley*, at p. 991; *People v. McPheeters* (2013) 218 Cal.App.4th 124, 132.) We presume that the jurors are intelligent persons, capable of understanding and correlating the instructions given. (*O'Malley*, at p. 991; *People v. Gonzales* (2011) 51 Cal.4th 894, 940.) Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation. (*People v. Riley* (2010) 185 Cal.App.4th 754, 767; *People v. Lopez* (2011) 198 Cal.App.4th 698, 708.) We independently determine whether the instructions given were correct and adequate. (*People v. Acosta* (2014) 226 Cal.App.4th 108, 119; *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1311.)

The People contend Ramirez has forfeited his challenge because he failed to object to or request modification of the instructions below. We agree. Although a defendant may raise a claim that his substantial rights were affected by instructions to which he did not object (§ 1259; *People v. Salcido* (2008) 44 Cal.4th 93, 155; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249), Ramirez fails to make such a showing here. As we explain *post*, the instructions given were not erroneous. Accordingly, Ramirez's substantial rights were not violated and his contention has been forfeited. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670; *O'Malley*, *supra*, 62 Cal.4th at p. 991; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927 ["Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights"].)

In any event, Ramirez's claim fails on the merits. The instructions given made it clear that jurors had to assess Ramirez's intent separately from Solano's. CALCRIM No. 401 stated that, to be guilty of a crime as an aider and abettor, the People had to prove the defendant, i.e., Ramirez, (1) knew that the perpetrator, i.e., Solano, intended to commit the crime; (2) "the defendant intended to aid and abet the perpetrator in committing the crime," and (3) "the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime." The instruction then reiterated, "Someone *aids and abets* a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." CALCRIM No. 251 stated, "For you to find a person guilty of the crime in this case, that person must not only intentionally commit the prohibited act, but must do so with a specific intent" and "The specific intent required for the crime of Attempted Murder is the Intent to Kill." CALCRIM No. 600 reiterated that to prove attempted murder, "The defendant intended to kill" the victim. In other words, the jury was clearly informed that it had to determine whether Ramirez, individually and apart from Solano, intended to kill.

Furthermore, CALCRIM No. 203 provided: "Both defendants in this case are charged with the same crimes. [¶] You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately. . . . [¶] Unless I tell you otherwise, all instructions apply to each defendant." In light of CALCRIM No. 203, read in conjunction with the other instructions, there is no possibility jurors believed they could find Ramirez guilty if he lacked the

intent to kill. Nothing about the instructions suggested appellants' mental states had to be assessed in tandem. Reasonable jurors would not have assumed that if one defendant had a particular mental state, the other must have shared it. We presume jurors are intelligent persons, able to understand, correlate, and follow the court's instructions and apply them to the facts of the case. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 514—515; *People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.)

Nor were the instructions objectionable for referencing "the crime," as opposed to "the attempted murder." Appellants were charged with attempted murder, and only attempted murder. None of the attorneys, during argument, discussed some other, unspecified offense of which appellants might have been guilty. There was no danger reasonable jurors would have considered some other offense in place of the charged crime.

And, significantly, Ramirez's argument must fail because the verdicts demonstrated the jury did, in fact, assess Ramirez's mental state separately from Solano's. The jury found Solano committed the attempted murder with premeditation and deliberation. But it found the allegations that Ramirez premeditated and deliberated were *not true.* The verdicts conclusively established that the jury actually assessed the men's mental states independently, and did not misapply the instructions given. There was no error.

c. *Contrived self-defense instruction*

The trial court gave standard instructions on self-defense, including CALCRIM Nos. 3470, 3471, and 3474. Without objection, the trial court included with such instructions CALCRIM No. 3472, which provides in its entirety: "A person does not have the right to self-defense if he or she provokes a

fight or quarrel with the intent to create an excuse to use force." Solano, joined by Ramirez, contends that the instruction was improperly given because it was not supported by substantial evidence, and could have been misinterpreted by the jury to undermine the self-defense theory.

As with the foregoing claims of instructional error, because neither defendant objected to the instruction at trial and, as we explain, its use did not violate appellants' substantial rights, the contention has been forfeited. (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 [failure to object to CALCRIM No. 3472 forfeited appellate challenge]; see also *People v. Mora and Rangel*, *supra*, 5 Cal.5th at p. 471; *People v. Anderson*, *supra*, 152 Cal.App.4th at p. 927.)

The claim fails on the merits in any event. Assuming for purposes of argument that the instruction was unsupported by the evidence, we discern no reversible error. Appellants acknowledge that CALCRIM No. 3472 is a correct statement of law. (See *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333, citing *People v. Enraca* (2012) 53 Cal.4th 735, 761.) Where a trial court gives a legally correct, but inapplicable, instruction, the error is "generally ' "only a technical error which does not constitute ground for reversal." ' [Citation.]" (*People v. Cross* (2008) 45 Cal.4th 58, 67; *People v. Lee* (1990) 219 Cal.App.3d 829, 841 [error " 'is usually harmless, having little or no effect "other than to add to the bulk of the charge" ' "]; *People v. Rowland* (1992) 4 Cal.4th 238, 282.) We review such an error under the *Watson* standard, that is, whether it is reasonably probable defendant would have achieved a more favorable result in the absence of the error. (*People v. Debose* (2014) 59 Cal.4th 177, 205—206; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129—1130;

People v. Watson (1956) 46 Cal.2d 818, 836.) "In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Guiton*, at p. 1130.)

There is no reasonable probability the jury was misled or confused by CALCRIM No. 3472. "If CALCRIM No. 3472 was erroneously given because it was irrelevant under the facts, the error is merely technical and not grounds for reversal." (*People v. Eulian*, *supra*, 247 Cal.App.4th at p. 1335.) Moreover, the trial court instructed with CALCRIM No. 200, which provided in pertinent part: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." As *People v. Frandsen* explained, "appellant's assertion that no substantial evidence supported [CALCRIM No. 3472] does not warrant our finding reversible error because the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen*, *supra*, 196 Cal.App.4th at p. 278; *People v. Holloway* (2004) 33 Cal.4th 96, 152—153 [court could not assume that the jurors failed to follow the standard admonition to disregard any instruction inapplicable to the facts as they found them].) The prosecutor did not refer to CALCRIM No. 3472 during argument, nor did he suggest that Solano provoked a fight with the victim to create an excuse to stab him. (See *People v. Crandell* (1988) 46 Cal.3d 833, 872—873 ["we are confident the jury was not sidetracked by the correct but irrelevant instruction,

which did not figure in the closing arguments"], disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364—365.)

Solano argues that there was a "real possibility" the jury misapplied the instruction "in a way that took away appellant's right of self-defense," in that it suggested self-defense was not available to him. But, as the court in *People v. Olguin* reasoned, "we don't see how." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) In *Olguin*, the trial court instructed with CALJIC No. 5.55, the predecessor to CALCRIM No. 3472. The instruction was not supported by the evidence, but the court concluded its use had no bearing on the outcome of the trial. As here, the jury was instructed to disregard any instruction applicable to facts it determined not to exist. (*People v. Olguin*, at p. 1381; see *People v. Holloway*, *supra*, 33 Cal.4th at p. 152 [rejecting argument that jurors might have erroneously tried to apply factually inapplicable aspects of instruction; "we cannot assume any juror deliberated in such an irrational way"]; *People v. Crandell*, *supra*, 46 Cal.3d at pp. 872—873 [rejecting argument that improper use of CALJIC No. 5.55 "invite[d] the jury to speculate on the existence of a situation which would, if established, justify the rejection of his only defense to the murder charges"].) Likewise, here, CALCRIM No. 3472 did not require or suggest a finding that Solano provoked a fight in order to create an excuse to use force; it simply informed jurors of the legal significance of such a circumstance, *if* the jury found it to exist.

Solano's citations to *People v. Conkling* (1896) 111 Cal. 616 and *People v. Rogers* (1958) 164 Cal.App.2d 555, are unavailing. In *Conkling*, the defendant and others regularly used a road that crossed the shooting victim's land. The victim erected a fence to

prevent their travels. The defendant tore the fence down when the victim was not present. A few days later, the defendant and the victim encountered each other on the road and an argument ensued, during which the defendant shot the victim. (*Id.* at pp. 619—620.) He claimed the shooting was in self-defense. At trial, the court gave a lengthy instruction which allowed the jury to conclude that if the defendant committed misconduct by attempting to travel the road, he lost all right of self-defense. (*Id.* at pp. 624—626.) The instruction here was nothing like the instruction in *Conkling*.

People v. Rogers involved a fight between two groups of men after a traffic collision. The jury was given two inapplicable instructions. One stated that a person who sought or induced a quarrel could not assert self-defense unless he withdrew from the combat, informed his adversary of his desire for peace, and abandoned the fight. (*People v. Rogers*, *supra*, 164 Cal.App.2d at p. 557.) The second stated the same in regard to mutual combat. (*Id.* at pp. 557—558.) The court held defendant was prejudiced by the instructions because, since there was no evidence he attempted to withdraw from the melee or notified his adversaries of his wish to do so, the jury likely never reached the question of self-defense; the instructions "required them to reject" defendant's self-defense claim. (*Id.* at p. 558.) Assuming arguendo that *Rogers* was correctly decided, it is distinguishable from the instant matter. *Rogers* concerned two groups involved in a general melee and two inapplicable instructions, making application of mutual combat and self-defense principles more complicated than was the case here. *Rogers* does not make clear whether—unlike here—the inapplicable instructions were the *only* instructions given on the issue of self-defense. Further,

Rogers did not state whether the jury was instructed that some instructions might not apply, and did not rely on the principle—more recently stated by the appellate courts as well as our Supreme Court—that we presume jurors follow such instructions. Thus, *Rogers* does not assist appellants.

2. *Prosecutorial misconduct and ineffective assistance of counsel*

Solano contends the prosecutor committed misconduct during argument by illustrating the concepts of premeditation and deliberation with two analogies which, in Solano's view, "trivialize[ed]" them. Solano urges that defense counsel provided ineffective assistance by failing to object to the prosecutor's arguments. We discern no reversible error.

a. *Additional facts*

During opening argument, the prosecutor argued as follows: "When you are thinking of premeditation and deliberation, remember the judge's instruction. It is not just the length of time, but the moment of reflection. [¶] And I want to give you an example of that using our own daily lives. I assume most of you drove to court, or drive a car. Now, imagine you are headed towards the traffic light and that light turns yellow. [¶] As you approach that traffic light, you have a decision to make. Are you going to stop or am I going to go? In that moment, as quick as it may seem, you are making a premeditated and deliberate decision, and you exercise that decision. It is not something that you spend hours or days thinking about. But in that moment, you make that decision. [¶] Another example is this: If you are a sports fan—imagine a baseball player. He is facing the pitcher, and that pitcher throws the pitch towards him. [¶] In the split second, the baseball player has to react, decide

whether he is going to swing or let that pitch go. And if he swings, whether he is going to swing for the fences or just try to make contact to advance a runner, or get the ball out of [the] infield. Again, that is not a decision that that batter has days or weeks to decide about. It is in split seconds, but it is a premeditated and deliberate decision."

b. *Applicable legal principles*

"In California, the law regarding prosecutorial misconduct is settled: 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1052.) When a claim of misconduct is based on the prosecutor's comments before the jury, we consider whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Woodruff* (2018) 5 Cal.5th 697, 755; *People v. Adams* (2014) 60 Cal.4th 541, 568.) We consider the challenged statements in context, and view the argument as a whole. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894; *People v. Valencia* (2008) 43 Cal.4th 268, 304.) It is misconduct for a prosecutor to misstate the law during argument. (*People v. Rivera* (2019) 7 Cal.5th 306, 337; *People v. Bell* (2019) 7 Cal.5th 70, 111.)

To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection and ask the

trial court to admonish the jury to disregard the improper argument. (*People v. Linton* (2013) 56 Cal.4th 1146, 1205.) Here, defense counsel did not object to the challenged portions of the prosecutor's argument, and therefore any claim of prosecutorial misconduct has been forfeited. (*People v. Williams* (2016) 1 Cal.5th 1166, 1188; *People v. Covarrubias*, *supra*, 1 Cal.5th at pp. 893–894.) Recognizing this, Solano contends counsel's failure to object amounted to ineffective assistance. To establish ineffective assistance of counsel, a defendant has the burden to show counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Bell*, *supra*, 7 Cal.5th at pp. 125—126; *People v. Brown* (2014) 59 Cal.4th 86, 109.)

An intentional killing is premeditated and deliberate if it is considered beforehand and occurred as the result of preexisting thought and reflection, rather than as the product of an unconsidered or rash impulse. (*People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. Burney* (2009) 47 Cal.4th 203, 235.) To prove a killing was premeditated and deliberate, it is " 'not . . . necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.' [Citation.]" (*People v. Disa* (2016) 1 Cal.App.5th 654, 665; § 189, subd. (d).) The " ' "process of premeditation and deliberation does not require any extended period of time." ' " (*People v. Salazar*, *supra*, 63 Cal.4th at p. 245.) The true test is not the duration of time, but the extent of the reflection. " 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citation.]" (*People v. Potts* (2019) 6 Cal.5th

1012, 1027; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658—659 [planning involving premeditation requires "nothing more than a 'successive thought[ ] of the mind' "].)

c. *The prosecutor's argument did not constitute reversible misconduct*

Solano argues that the prosecutor's examples were improper because they "conflated premeditation and deliberation with intent." He points out that the goal of training a driver or baseball player is that "repeated practice will result in correct choices in situations that require more or less instantaneous responses, without the need for thought."

Viewed in context, the prosecutor's traffic light analogy was not improper. *People v. Avila* (2009) 46 Cal.4th 680, found no error in a similar argument. The *Avila* prosecutor "used the example of assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, as an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.' He then immediately said, 'Deciding to and moving forward with the decision to kill is similar, but I'm not going to say in any way it's the same. There's great dire consequences that have a difference here.' " (*Id.* at p. 715.)

As to the baseball analogy, the prosecutor here did not suggest that a reflexive, thoughtless swing of the bat would suffice for premeditation. Instead, the prosecutor's point was that a baseball player has to make a conscious decision to swing at a particular pitch. He must also decide, when taking that swing, where to place the ball—a decision dependent upon the

particular strategic play necessary at that point in the game. Thus, the prosecutor's illustration was aimed at showing the conscious decisions involved in a batter's efforts.

Moreover, the prosecutor did not argue that Solano premeditated in a split second. His point was that premeditation did not require hours, days, or weeks of thought. After making the baseball and traffic light analogies, the prosecutor argued that premeditation and deliberation was evident because Solano armed himself with a knife, made the decision to find Alvarado at the park, went to the park, approached Mares, stabbed him, and chased him when he attempted to escape the attack. Viewed in context, reasonable jurors would not have understood the prosecutor to suggest that a reflexive, thoughtless action could suffice to prove premeditation and deliberation. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 894 [we do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecutor's statements]; *People v. Shazier* (2014) 60 Cal.4th 109, 144.) Certainly, we cannot say that the prosecutor's illustrations amounted to deceptive or reprehensible methods, or infected the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process.

Solano's citations to *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36, and *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171—1172, for the proposition that the prosecutor's illustrations were misleading, do not assist him. In those cases, the prosecutor's arguments pertained to the reasonable doubt standard, not premeditation and deliberation.

Even assuming the prosecutor's argument went too far in understating the relevant principles, there is no reasonable probability that, had the baseball and yellow light analogies been

excluded, a more favorable result for Solano would have resulted. The challenged portion of the argument was brief. The jury was properly instructed on premeditation and deliberation. It was also instructed that the arguments of counsel were not evidence, that it should be guided by the trial court's instructions, and that if anything the attorneys said conflicted with the court's instructions, it had to follow the instructions. Indeed, the prosecutor reiterated this point, stating: "What we say is not evidence. The judge was clear about that in her jury instructions. . . . What we say about the law doesn't matter. What the judge says about the law matters." There was no reversible misconduct.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.